Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1316

TURNER ELKHORN MINING COMPANY, ET. AL.,
Appellants,

v.

JOHN T. DUNLOP, SECRETARY OF LABOR AND
CASPAR W. WEINBERGER, SECRETARY
OF HEALTH, EDUCATION AND WELFARE,
Appellees.

On Appeal from the United States District Court for the Eastern District of Kentucky

BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

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BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

The Bituminous Coal Operators' Association Inc., respectfully files this brief *amicus curiae,* with the written consent of all parties (Appendix 1a-1b), pursuant to Rule 42 of the Rules of the Supreme Court.

I

INTEREST OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION

The Bituminous Coal Operators' Association, Inc. (hereinafter referred to as BCOA) is a voluntary nonprofit association of bituminous coal mine operators. It was established in 1952 out of an effort to bring a degree of stability to the labor-management relations chaos and the long and bitter strikes that had long characterized the coal industry. Since that time, BCOA has continued to exist for the purpose of negotiating periodic labor agreements with the United Mine Workers and aiding its members in interpreting these agreements and devising and strengthening mechanisms for bringing about industrial peace in the coal industry. BCOA also is the principal coal industry spokesman on matters involving health and safety under the Federal Coal Mine Health and Safety Act of 1969.

BCOA membership is open to any bituminous coal company that is signatory to the National Bituminous Coal Wage Agreement. Its membership includes both individual coal companies and state and local coal associations. The direct and indirect members of BCOA are located throughout the coal mining areas encompassing all of the coal producing states and collectively produce at least 65 percent of the bituminous coal produced in the United States.

BCOA, therefore, has a continuing interest in the implementation and enforcement of the Black Lung Benefits provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended, (hereafter "the Act"), which is applicable to the mining operations of each of its members.

II

THE QUESTIONS ARE OF GREAT IMPORTANCE

This brief *amicus curiae* addresses itself to the magnitude of the impact of the black lung benefits program on the coal mining industry. It demonstrates, we submit, that the issues involved are of enormous importance to the coal industry in general and to the member companies of BCOA in particular and that probable jurisdiction should be noted.

A. There Is a Lack of Clear Parameters for Black Lung Liability

From the outset, the problem in administering the unique compensation features of Title IV of the Act, which cast liability on present coal mine operators for conditions arising out of past employment relationships, has been the inability to define the beneficiary population. This lack of a clearly defined population makes it impossible for a coal mine operator to assess his potential liability and bears directly on the mine operator's cost of securing and his ability to secure his potential liability, through either private insurance contracts or self-insurance plans.

Employment in bituminous coal mines has declined from a high of 650,000 production workers in 1923 to 120,000 in 1970, when the Act became effective.[1] Since then, the number of employees has increased to approximately 140,000.[2] Thus, the number of former

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[1] Bureau of Labor Statistics, Department of Labor, *Wage Chronology-Bituminous Coal Mine Operators and United Mine Workers of America; October 1933—November 1974*, p. 1 (Bulletin 1799).

[2] U. S. Department of Interior, *Bureau of Mines Mineral Yearbook* (1972).

coal miners exceeds the current labor force in the coal industry by a factor of more than 4. There are currently 83,745 of these former miners on pension under the industry pension fund.

Apart from the grossly disproportionate number of former miners to active miners, the coal mining industry has yet another unique characteristic—it has the oldest labor force of any industry with the exception of the railroad industry.[3] The coal mine labor force has a substantial percentage of miners 45 years of age or older, most of whom have long work histories in the mines.

These factors make it impossible to determine the parameters of black lung liability. Of the 279,000 pre-1972 amendment claims which were allowed, 174,000 (30,000 more than the *entire* current work force) were filed by miners and the remainder by widows and other survivors.[4] An additional 60,000 claims are pending with the Department of Labor.[5]

Thus, the current potential liability includes the 60,000 pending claims, an unknown percentage of those active miners over the age of 45, and an unknown number of men no longer employed in the industry.

This inability to define the class or determine the approximate number of beneficiaries is reflected in the constant underestimation by government officials of the cost of the benefits program. The cost, originally

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[3] U.S. Department of Labor, *Monthly Labor Review* (March 1974) p. 29.

[4] *Id.* at 28.

[5] Statement of Carl E. Bagge, President, National Coal Association, before Subcommittee on Labor Standards, House Committee on Education and Labor, presented March 13, 1975.

estimated to be $3 billion over a 20 year period, will now reach almost $20 billion. The Social Security Administration currently is paying out benefits at an annual rate close to one billion dollars, which is almost 7 times the rate estimated originally![6]

The cost of the benefits program to individual coal mine operators is economically devastating. The present discounted value of each black lung claim has been actuarially estimated to be upwards of $56,000, plus an additional $12,000 representing the present discounted value of the accompanying medical benefits.[7] The insurance estimate now generally accepted in the industry is that the premium rate for federal black lung compensation coverage will cost approximately $25 per $100 of payroll,[8] and self-insurance plans, which must be approved by the Secretary of Labor, require a typical mine operator who employs 20 or more employees to post security with the Secretary in the amount of $175,000 plus approximately $75,000 per 100 employee-miners in excess of 100.[9]

B. The Labor Force in the Coal Industry Would Be Rendered Relatively Immobile

The unique feature of the black lung program, as administered, which casts full liability on the last em-

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[6] Statement of Steven Kurzman, Assistant Secretary, Department of Health, Education and Welfare before the Subcommittee on Labor Standards, House Committee on Education and Labor presented March 13, 1975.

[7] Affidavit of J. Huell Briscoe, actuary, submitted in support of Plaintiffs' Motion for Summary Judgment filed in District Court on February 15, 1974.

[8] Deposition of George Reall, January 16, 1974, filed in District Court.

[9] 20 C.F.R. 726.101 (b) (4).

ployer for respiratory ailments resulting from prior coal mine employment tends to make former miners not reemployable in the industry and to render the active labor force immobile.

The demand for increased coal production to meet the Nation's current and future energy needs is expected to result in a sharp increase in the size of the coal industry labor force. Normally, such employment opportunities would draw from the ranks of former, experienced miners. This would be particularly true today, in view of current high wage levels in the coal industry, dramatic improvements in mine health and safety and poor employment opportunities in other industries. However, employment of former coal miners could well become economically unfeasible, regardless of the extent of their mining experience, for the simple reason that their new employer may be purchasing a black lung benefits claim of a discounted value exceeding $68,000.

Similarly, the Black Lung Act tends to inhibit the mobility of the current labor force. In the past, several industry characteristics have contributed to a high level of mobility among coal miners. One is the nature of coal mining itself, which produces an exhaustable product. As a coal mine begins to be worked out, the miners move on to newly opened or existing mines, frequently operated by another mining company. Another characteristic which contributes to the mobility of the work force is the geographical clustering of large numbers of coal mines. Unlike industries which have great latitude in locating their manufacturing facilities, the mining industry locates in the coal fields of a handful of states. Thus, a wide choice of employment is available to most coal miners, within driving distance of their homes.

Active miners will thus be "locked in" to their current employer, for a new employer (whose operations presently must meet respirable dust standards which medical authorities agree should eliminate the risk of contracting pneumoconiosis) will not be likely to employ an experienced miner who represents a potential black lung liability in excess of $100,000.

C. The Mine Operator Will Bear the Cost of Providing Duplicative Benefits

Under the industry's current labor agreement with the United Mine Workers of America—the National Bituminous Coal Wage Agreement of 1974—already retired coal miners who are receiving state or federal black lung benefits receive a monthly pension of $200.00 (increasing to $225.00 in 1976) and are entitled to a "health services card" which provides all-inclusive medical care to the miner, his wife and dependents. Fund records indicate that 75 percent of coal mine pensioners are receiving black lung benefits. Coal miners who retire in the future will receive pensions up to over $500.00.

These contract benefits, paid from employer-financed pension and welfare funds, are costly to the individual mine operator. The current employer contribution is $.74 per ton of coal produced plus $.90 per hour of work. That contribution increases in the final year of the 3-year contract to $.82 per ton and $1.54 per hour, or the equivalent of $1.60 per ton.

The federal black lung benefits program, obligating the last employer to pay the total cost of compensation and medical benefits, is even more costly to the individual mine operator. Such claims, actuarially estimated to have a present discounted value in excess of $68,000,

will cost the last employer approximately $25.00 in insurance premiums for each $100.00 of payroll. These costs, which do not include the cost of insuring or securing claims under state black lung programs, must, of course, be reflected in current prices despite the fact that they represent a past liability which previously did not exist and compensate for a respiratory condition which was not until recently medically attributable to the industry.

D. Mine Operator Efforts To Comply with Mandatory Health and Safety Standards Will Be Neutralized

Pneumoconiosis was recognized as a disease by medical authorities in this country only since the mid-1950's and it was not until 1970 that mandatory programs for the control of respirable coal dust became effective and the disease became compensable.[10]

Nevertheless, the Act purports to impose on current mine operators who have been and are in full compliance with federal health and safety standards *total* liability for respiratory ailments contracted during prior employment relationships with other employers when the disease was not recognized and means were not developed for reducing or eliminating its incidence.

Medical experts are in agreement that the Act's mandatory health standard requiring operators to maintain respirable coal dust levels not greater than 2 milligrams per cubic meter of air should result in the elimination of pneumoconiosis as an occupational disease

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[10] Remarks of Senator Javits of New York, House Committee on Education and Labor, *Legislative History/Federal Coal Mine Health and Safety Act*, p. 339.

for coal miners entering the industry in the 1970's.[11] Virtually all mines have met this important dust level requirement, with enormous capital expenditures and heavy commitments of manpower and technology.

It does not seem entirely fair that the Act simultaneously imposes on the operators of the more than 2,000 underground and surface bituminous mines a liability which previously did not exist, for a disease which previously was not recognized and for the prevention of which no methods previously had been developed or mandated.

It is obviously unfair that the Act which mandates dust levels medically believed to eliminate the risk of pneumoconiosis simultaneously creates operator liabilities based on presumptions as to disability that are not allowed to be disproved.

It is thus not surprising that government medical authorities have suggested that "in the long run such a philosophy would compromise not only the dust control program, but also the health of U.S. Miners.[12]

III

CONCLUSION

The foregoing, we submit, amply demonstrates the magnitude of the impact of the federal black lung benefits program on the coal mining industry and the

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[11] Statement of Andre Maisonpierre, Vice President, American Mutual Insurance Alliance before Subcommittee on Labor Standards, House Committee on Education and Labor, presented February 25, 1975.

[12] Statement of Dr. W.K.C. Morgan, former Director, Appalachian Laboratory for Occupational Respiratory Disease before Subcommittee on Labor Standards, House Committee on Education and Labor, presented February 27, 1975; p. 5.

substantiality of the issues raised in this case and further supports the position of Appellants *Turner Elkhorn Mining Company et al.* that probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

OFFICE OF THE SOLICITOR GENERAL
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April 4, 1975

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Farmer, Shibley, McGuinn & Flood
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Washington, D.C. 20036

Re: John T. Dunlop, Secretary of Labor, et al. v. Turner Elkhorn Mining Company, et al.

Dear Mr. Farmer:

As requested in your letter of March 31, I hereby consent to your filing a brief amicus curiae in the above case on behalf of the Bituminous Coal Operators Association.

Sincerely,

/s/ ROBERT H. BORK
Robert H. Bork
Solicitor General

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April 4, 1975

Guy Farmer, Esq.
Farmer, Shibley, McGuinn & Flood
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Turner Elkhorn Mining Co. v. Brennan

Dear Mr. Farmer:

On behalf of the plaintiffs in the above captioned litigation, I consent to the filing of a brief *amicus curiae* on appeal to the United States Supreme Court by the Bituminous Coal Operators Association.

Very truly yours,

/s/ R. R. MCMAHAN
R. R. McMahan
Counsel for plaintiffs
Turner Elkhorn Mining Co.
et al.